*United States Court of Appeals*

*for the Second Circuit*

# APPELLANT'S REPLY BRIEF

77-1578

# 75-7600

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P/S

## United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
*Plaintiff-Appellant,*

*—against—*

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR PLAINTIFF-APPELLANT**


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## Statement

Defendants' answering briefs and our initial brief are, in the main, ships passing in the night. The reason that this is so is that defendants have declined to meet, or have elected to meet superficially, the points of law on which we urge reversal, while devoting the great preponderance of their papers to an attempted showing of why findings that are irrelevant in law are supported by "substantial evidence."

We will show, first, why that approach is off-course. We will then discuss defendants' arguments as to why they are not fixing prices (and their unaccountable contention that CBS did not advance a *per se* price-fixing claim "prior to trial"). Finally, we will address several key misdescriptions of the record that relate to subsidiary grounds for reversal.

### A. Contrary to Defendants' Assertion, No Ground on Which CBS Urges Reversal Requires Extensive Analysis of Findings against a "Substantial Evidence" Test; Indeed, All but the Most Subsidiary Ground Seek Reversal as a Matter of Law.

1. The thrust of this appeal is that the decision below should be reversed as a matter of law—*i.e., on the facts as the trial court found them.*

Point I of our main brief supported the legal contention that, when a group of otherwise competing sellers, such as defendants, arrange to have a common-sales agency market their products at prices set by the agency, they are fixing prices just as clearly as are conspirators in a garden-variety price-fixing case—and, as in such cases, they are violating Section 1 of the Sherman Act, regardless of whether their customers are "compelled" to deal at the agreed-upon prices.

The pivotal holding of the decision appealed from was that such "compulsion" must be proven as an element of the price-fixing offense. That ruling is wrong *in law* and the decision should be reversed on that ground, even if every finding of fact made by the court below were endorsed.

2. Alternative grounds for reversal are set forth in Points II and IV of our main brief. Defendants do not meet either point on the law, so we will not restate them here at any length.

For present purposes, it is sufficient to note that neither of those points depend upon a demonstration that any of the district court's findings of fact are clearly erroneous. Both arguments are based on the proposition that the trial court applied an erroneous legal standard. The trial court held that "non-viability" of alternatives is essential to establish "compulsion" (supposedly material to a price-fixing claim) and the relevant market definition (pertinent to a monopolization claim). We showed in Points II and IV that "non-viability" of alternatives is not the appropriate legal standard and that, as a matter of law, it should be sufficient to establish that the supposed alternatives entail sanctions or economic disadvantages.

If this Court agrees with Point II or IV on the law (and disagrees with Point I), the case could be remanded for the purposes of having the trial court make findings as to whether such sanctions exist or disadvantages are threatened.

Alternatively, this Court could direct a judgment of liability (as distinguished from a remand) under either Point II or Point IV, since the sanctions and disadvantages req-

uisite under a proper standard were conceded by defendants, were neither discussed nor disputed by any findings made below,* and are not even now contested in defendants' answering briefs (*see infra at* 22, 25).

3. If and only if the trial court were sustained in all its legal conclusions do we urge this Court to overturn any findings of fact as clearly erroneous; but, here again, no extensive review of the record is involved. The question presented is whether the trial court's ultimate findings regarding the practicability of a bypass alternative were clearly erroneous given defendants' categorical admissions (both judicial and testimonial) that a bypass was impracticable.** We submit that findings based on the testimony of defendants or their agents cannot be upheld against unexplained party-admissions that squarely contradict those findings.

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*Thus, when defendants suggest that we are asking the Court to embark upon some enormous fact-finding "enterprise," defendants seriously misread our position. In Point II.B. of our main brief, we reviewed the findings primarily, as is there stated, to show that they relate exclusively to the extreme standard of "non-viability" and in no way dispute the fact of competitive disadvantage. Indeed, as we point out in that section, several of the findings made by the court support the fact of competitive disadvantage. That is hardly a discussion asking this Court to set aside the lower court's findings.

As for the Addenda to the brief, the main purpose, again as stated, is to compile the evidence which additionally demonstrates competitive disadvantage (as well as to give testimonial content to a proposition which should in any event be presumed: the impact of the common-sales-agency system on any putative direct-licensing prices).

Both Point II.B. of the brief and the Addenda do refer to several specific findings that are plainly erroneous. Principally, these consist of clear mathematical mistakes or statistical fallacies as to which there cannot be any reasoned dispute (*e.g.*, music usage data summarized in Addendum D), or of a number of factual statements that *no* evidence supports, that considerable evidence refutes and which are therefore erroneous by any standard. But reversal in this case is not dependent upon the overturning of those incidental, erroneous findings. The obviousness of the errors simply supplements the Points II and IV grounds.

**Those admissions are compiled in Addendum E to our main brief. Not one of them is referred to in defendants' answering papers; and apart from what we believe to have been plainly erroneous constructions of the CBS-ASCAP and CBS-BMI stipulations (also questions of law), none of them is referred to in the opinion below.

We also believe, however, as we emphasized in our main brief, that the Court need not reach either of the subsidiary grounds for reversal (outlined in paragraphs 2 and 3 above) in the light of the district court's clear error with respect to our price-fixing contention.

**B. Defendants' Arguments That They Are Not Fixing Prices Are Unsound.**

Defendants' most prominent counter to our *per se* price-fixing contention is their extraordinary charge that we did not make the point "prior to trial" (ASCAP Br. 15-16; BMI Br. 8-9). The fact is that we repeatedly argued the *per se* price-fixing point in every substantive brief submitted and oral presentation made—from within a month after joinder of issue, in 1970, through 1974—and it was repeatedly rejected by the trial court. ASCAP itself acknowledged in September 1971 that "CBS's *major* antitrust attack upon ASCAP is the claim that ASCAP 'fixes prices'" (JA 189) (emphasis added).

Indeed, defendants' present charge to the contrary is so far removed from reality, and so demonstrably untenable, that one can only wonder at defendants' temerity in having advanced it.* Since they have, we must respond;

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*That wonder is not alleviated by the fact that the decision appealed from made similar statements paraphrased from defendants' post-trial briefs. The trial court simply lost sight of the record facts; but defendants should have had sufficient familiarity with the prior proceedings to have foreborne from the attempt to perpetuate the court's obvious mistake.

And surely they should have foreborne from attempting to perpetuate that mistake by the use of selective quotations. As one example, among several, ASCAP, to show our purported abjuration of a price-fixing claim, quotes CBS counsel as saying on a 1971 oral argument that "the case turns on" the "elimination of competition" rather than "*per se* pigeonholes" (ASCAP Br. 16, n.). ASCAP, however, excises the immediately following sentence and passages which read:

> "*But any notion that the defendants in this case are not fixing prices stems from an entirely erroneous concept of what price fixing is.* Price fixing is an agreement by competitors not to compete on a price basis or to engage in activities that will have that effect.
>
> "Such agreement can be implemented by an understanding that competitors will charge, say, $1,000 for a ton of oil, if

*(footnote continued on next page)*

and the pertinent record is compiled in Addendum F annexed to this brief.*

All other reasons put forth by defendants as to why they are not fixing prices simply reconfirm that they are.

1. Defendants principally contend that, even if their common-sales agencies sell at agreed-upon prices, there can be no restraint on price competition, and no price-fixing, so long as the members do not "compel" customers to deal with the agencies and do not "agree" on the prices to be charged in any putative direct-licensing transactions.

There is notably absent from defendants' briefs any attempt to explain this proposition further, economically or in law. To do so reveals its invalidity—specifically that it ignores not merely one, but two types of restraints that are imposed by the common-sales-agency device, each of which is unlawful *per se*.

The first restraint is that which converts the tense of the contention from the subjective to the present—*i.e.*, the members of these common-sales-agency combinations are now, beyond question, fixing prices on sales made through the agencies, so that price competition *on those sales* is not only restrained, it is eliminated.

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that is the way oil is sold but that is certainly not the only way that a combination can fix prices.

"For example, if competitors agree to buy up distress merchandise so as to support the market price of non-distress merchandise, that is price fixing. That was the *Socony-Vacuum* case.

"Likewise if they agree to charge each customer X per cent of the customer's income, that is price fixing.

". . .

". . . price fixing turns on the fact that a customer is paying a price which has not been hammered out on the anvil of competition but a price that has been influenced by an agreement, understanding among competitors, that is price fixing." (JA 270-72) (Emphasis added.)

*That addendum also deals with defendants' related and equally baseless assertions of other purported "shifts" in CBS's position; the charge that issues of fact were "tendered" by CBS; and the notion that the trial court's rulings of law and definition of issues left CBS with a reasonable possibility of obviating a trial by obtaining summary judgment.

To see that with unmistakable clarity, one need only follow these steps:

If there were no ASCAP or BMI, and the publishing corporations conspired to charge $1,000 a use in direct sales, that would represent the garden-variety price-fixing case, and even these defendants would admit the violation. Likewise, if the publishers appointed a committee to make their sales at $1,000 a use, that too would be price-fixing, as the Supreme Court held in *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 135 (1969), "beyond peradventure." Thus, if the publishers and their committee happen to notice after a period of years that each television network was paying in the aggregate about $5 million a year (the sum of all those $1,000-a-use payments), and the committee decided to change the system by charging each network an annual price of $5 million for unlimited uses (and to make distributions to its members at $1,000 a use or whatever) no one could rationally disagree that the publishers were still fixing prices through their committee (the common-sales agency).

In all three cases, prices would not be determined, as required, by the "unrestrained interaction of competitive forces" (*Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 4 (1958))—they would be determined by agreement. Consequently, whatever direct sales the members of the agency might transact, the fact would remain that on all *agency* sales prices were being fixed; competition was being restrained; Section 1 was being violated.

The only difference between the last of the three arrangements described above and the present system is that the present system was not preceded by two earlier forms of agreements—but since all three are substantively identical in terms of anticompetitive effect, that is a difference of no antitrust significance.

The second restraint is that which would be imposed on direct-sales transactions, even assuming that there were not sufficient barriers to prevent their occurrence.

It is that the price at which the common-agency sales were being made would provide a reference point that would inevitably stabilize direct-sales prices. The influence

of such a reference point has been presumed in other cases (*United States* v. *Container Corp. of America,* 393 U. S. 333 (1969); *Plymouth Dealers' Ass'n.* v. *United States,* 279 F. 2d 128 (9th Cir. 1960)); here, it was admitted by defendants at and before trial (*see* testimony and other statements quoted at 37-40 of our main brief, and at 20, n., *infra*) and now effectively admitted again in defendants' answering briefs (ASCAP Br. 79-80; BMI Br. 13). That such an influence constitutes a sufficient additional restraint as to make the common-sales-agency system additionally unlawful is demonstrated, *a fortiori,* by those decisions.

Thus, from the customer's standpoint, whether he buys from the agency at the price fixed by the agency, or buys directly from the members at a price artificially boosted by the presence of the combination in the market, he is not getting a competitive price—he is getting the very sort of conspiratorially tainted price that the antitrust laws were enacted to prevent. "Compulsion" to buy from the agency may aggravate the consequences of the restraint, but since restraint exists whether or not "compulsion" is exerted, "compulsion" is not rationally an element of the offense.

The same proposition may be seen from this perspective: There is no difference helpful to defendants between, on the one hand, the supposed "freedom" of members to sell at other than agency prices (or the supposed lack of "compulsion" on customers to buy at such prices) and, on the other hand, the freedom of sellers in the garden-variety conspiracy case to sell at other than agreed-upon prices (or the consequent lack of "compulsion" on customers to buy at the price the conspiring sellers had agreed upon).

In the garden-variety price-fixing conspiracy, tacit or express, it is, of course, exceedingly rare to find sellers adhering to agreed-upon prices with monolithic uniformity. They not only have "freedom" to sell at other than agreed-upon prices; they frequently do so (*e.g., Ohio Valley Electric Corp.* v. *General Electric Co.,* 244 F. Supp. 914, 930-31 (S. D. N. Y. 1965)). Yet that "freedom" does not alter

the facts that some sales are made at the agreed-upon level and that prices offered in others are influenced by the reference point of the agreed-upon price.

Thus, in the routine price-fixing conspiracy action, a *per se* restraint of competition is held to exist in the *presence* of the defendants' "freedom" to sell at other than agreed-upon prices, and in the *absence* of any "compulsion" forcing buyers to accept agreed-upon prices.

By the same token, the "freedom" of common-sales-agency members to sell at other than agency-set prices does not alter the facts that sales made by the agency itself on the members' behalf are at fixed prices, or that such agency prices would inevitably influence the prices offered in direct sales.

In short, since the same two types of restraint occur in *both* the garden-variety case *and* the common-sales-agency case in the absence of "compulsion," there are no reasons inherent in antitrust objectives why price-fixing through a common-sales-agency device should be permitted if "compulsion" is not exerted, whereas price-fixing by loose arrangements or understandings among sellers, tacit or express, is violative of Section 1 regardless of any such factor.

2. As to the admitted price-stabilization effect of the common-sales-agency system, the BMI defendants contend that it is really no different from the price influence of a single seller's own prior sales:

> "In negotiating with a customer, any seller will consider what he has obtained in past sales to other customers, directly or through middlemen. There is nothing unlawful about this common and sensible practice." (BMI Br. 13)

ASCAP's argument is the same (ASCAP Br. 79-80).

Yet there is all the difference in the world.

There is nothing unlawful about a single seller being influenced in present price negotiations by the price that the same single seller charged in prior transactions or,

indeed, by the price that other single sellers charged in prior transactions in a competitive market. But that is not the influence that would obtain here in the event that the music publishing corporation members of ASCAP and BMI were to engage in direct licensing; and it is not the influence that we discussed in our main brief.

What we are talking about here is the influence on putative direct-licensing prices that would be exerted by an industry-wide price-fixing agreement (effectuated through the common-sales-agency device) (*see* our main brief at 37-50). Neither group of defendants even attempts to explain how that sort of influence could be lesser, or better, than the influence on price presumed to occur and found illegal in *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940); *United States* v. *Container Corp. of America,* 393 U. S. 333 (1969); and *Plymouth Dealers' Ass'n* v. *United States,* 279 F. 2d 128 (9th Cir. 1960), or how the "interaction of competitive forces" could operate in the required "unrestrained" way in the presence of such an artificial, consortium-caused factor.

3. Defendants, however, profess not to understand the applicability of *Socony-Vacuum, Container Corp.,* or *Plymouth Dealers*—those cases involved, say defendants, agreements among competing sellers to buy distress oil, to exchange price information or to circulate "list" prices on automobiles; and what, ask defendants, have those things got to do with us? (ASCAP Br. 74; BMI Br. 10-11.) The point is that those cases apply here *a fortiori* in three respects.

a. In each of those cases, the Courts found to be "one species of price-fixing" an activity agreed upon by competing sellers that would tend to affect prices; but which was certainly *not* an agreement regarding the prices at which any one of them would actually sell. Here, otherwise competing sellers have agreed on the prices at which they would actually sell through the common-sales-agency device; the only "freedom" they purportedly retain is also to make sales directly (although, in reality, there have never been any direct sales).

b. In those cases, the Courts conclusively presumed that agreements not specifying the prices to be charged would necessarily affect prices to be charged. Here, the agreement is precisely an agreement regarding prices to be charged, so that the presumption of effect on any putative direct-sales prices must be even stronger.

c. In those cases, a conclusive presumption was essential to the holdings, because the evidence did not categorically establish a price-stabilization effect (it almost never will, unless conceded, because such an effect is almost impossible to quantify). Here, such an effect was admitted at trial and admitted again in the answering briefs.

4. ASCAP contends that the trial court was "correct" in relying on *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100 (1969), for the proposition that "compulsion" is an element of price-fixing when otherwise competing sellers market copyrights in a pool. "For," ASCAP argues,

> "unless there is some inherent illegality or evil about a package or blanket license (and *Zenith* held there was not), then the doctrine of *Zenith—i.e.,* that illegality is shown only by proof of 'compulsion'—must apply." (ASCAP Br. 72-73)

*Zenith,* however, was not a price-fixing case; it condemned as patent misuse the insistence by a *single* owner of a group of patents that its licensees pay royalities on unpatented products. In that case, there would have been no abuse of patent leverage, and no anticompetitive effect, unless that single seller "compelled" licensees' acceptance of those terms or refused to license on any other basis.

What the ASCAP argument therefore misperceives is that, while there may be no "inherent illegality" in a package license offered by a single seller (there at least is no combination to fix prices which is an offense that a single seller cannot, by definition, commit), there is certainly "inherent illegality" in a package license offering the products of otherwise competing sellers at prices fixed by a common-licensing agency. The latter (which is this case) achieves

an anticompetitive effect regardless of any "compulsion" exerted on the buyer to deal with the agency; accordingly, "compulsion" is not an element of the offense.*

5. Attempting further to buttress the lower court's reliance on *Zenith* v. *Hazeltine,* ASCAP contends that it is really no different from the defendant, Hazeltine, because

> "Hazeltine, the corporate entity, did not create the patents in its pool—it acquired those patents pursuant to agreement with its employees or by purchase. In this sense, ASCAP is no less a 'single seller' because it acquires its rights—on a nonexclusive basis (unlike Hazeltine)—by virtue of agreements with its members." (ASCAP Br. 71, n.)

The trial court itself did not make that point, and for good reason.

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*ASCAP says it is "the greatest irony" that CBS believes the trial court erred in excusing ASCAP from price-fixing on the authority of *Zenith* when CBS relied on *Zenith* both in its initial letter to ASCAP requesting per-use terms and in its complaint (ASCAP Br. 72).

ASCAP fails to note, however, that CBS relied on *Zenith* for a different proposition. We believe that defendants' blanket licenses indeed violate the *Zenith* misuse rule, for the reasons set forth in the complaint and the letter (JA 19, 31); and that violation was urged below and referred to in our main brief (Br. 29, n.). But we certainly have never relied on *Zenith* to show that defendants are price-fixing—the case has nothing to do with that point.

The real basis for defendants' "irony," however, is their present pretense that the complaint did not charge price-fixing at all—only *Zenith* misuse (ASCAP Br. 14-15; BMI Br. 5-6). Defendants have never had the slightest doubt that the operative facts averred in the complaint charge them, *inter alia,* with price-fixing. ASCAP counsel, on oral argument in 1971, stated,

> "But, your Honor, if you just hold that complaint steady for a while and let the breeze clear away the scent and let the sequins subside so they won't shimmer in the sunlight you will find the same old cliches with respect to ASCAP as if we were living in the pre-1940 era. ASCAP is a conspiracy; its catalog is a pool; it is engaged in boycotts; price fixing, all words, words that were once used, that once may have had content but which today are empty labels signifying nothing." (JA 201-02)
>
> "The complaint alleges that the rate structure of ASCAP is the product of price fixing." (JA 203)

There is no "irony," therefore; there is only an attempt to confuse.

The antitrust laws recognize the basic difference between what ASCAP does (act as a common-sales agency for thousands of otherwise competing sellers) and what a corporation such as Hazeltine does when it buys the businesses, patent rights or assets of others. Thus, if ASCAP acquired title to all of its members' 3,000,000 copyrights, it would not be guilty of price-fixing under Section 1 of the Sherman Act when it licensed others to use those copyrights. It would, on the other hand, have committed a blatant violation of Section 7 of the Clayton Act and would have unquestionably violated Section 2 of the Sherman Act.*

Hazeltine may or may not have violated Section 7 or Section 2 by its acquisition of patents—at least it was not so charged in the case under consideration. But the fact that it, a single seller, was not held guilty of price-fixing—also not charged in that case—is of no help to defendants on this appeal.

6. ASCAP also insists that it is not fixing prices on otherwise competing copyrights because it purveys only a single product—"convenient" access to those copyrights (ASCAP Br. 9-10).

If Section 1 could be avoided simply by labeling a price-fixed pool of copyrights or patents a "convenience" or "convenient service," then, of course, every group of otherwise competing owners of such rights could commence fixing prices by that means.**

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*By the same token, if all the banks in New York City were to merge, the resultant corporate entity would not be guilty of fixing interest rates on loans, but it would certainly be guilty of violating Sections 2 and 7.

**There may be some forms of price-fixing arrangements that are not merely "convenient" but actually essential to the functioning of the market. Such conditions are rare but concededly do not apply in this case (400 F. Supp. at 760-63, JA 607-10; *see* Addendum E to our main brief at 1-2). Where they obtain, the argument would be that the price-fixing was exempted from the *per se* rule by reason of a market-functioning necessity—not that it wasn't being committed. If all that price-fixers had to do to insulate a common-sales-agency scheme from Section 1 was to claim their instrumentality was "convenient," then the price-fixing offense would be effectively written out of the law.

ASCAP repeatedly emphasizes in this connection that its "service"—access to all copyrights in its pool—"by definition, cannot be sold by ASCAP members" (ASCAP Br. 75; *also see id.* at 9, 10, 27). Of course, that's right—"by definition." Absent agreement, MGM cannot market the films made by Universal and 20th Century Fox. But that fact hardly means that those three companies would not be fixing prices if they entered into an agreement to appoint a common agent to license their otherwise competing movies at prices fixed by the agent. Yet that appears to be what ASCAP is trying to say.

7. In the same vein, the ASCAP defendants assert that their pool of otherwise competing copyrights is no different from a symphony orchestra's "pool" of a hundred musicians' performances, so that if the proprietor of a symphony orchestra is not fixing prices on those services when it sells an orchestra performance at a flat fee of $5,000 a concert, ASCAP is not fixing prices on copyrights when it charges a flat fee for a blanket license to its copyright pool (ASCAP Br. 75, n.).

This, we submit, is pushing analogy beyond common sense; but it is instructive to identify the fallacy.

The proprietor of the orchestra (be it a corporation, individual owner or a partnership of the musicians themselves) purchases the services of the musicians, transforms those services into a finished product (an acceptable concert performance of a symphony), and resells that finished product to buyers. Moreover, it is evident that great effort and talent must be added to and imposed upon the abilities of one hundred individual musicians in order to achieve that result. Thus, that finished product is different in kind from its individual elements, in much the same sense that the finished product of a Broadway play or theatrical motion picture is different in kind from individual services rendered by authors, directors, actors, costume makers, etc.

Hence, neither the proprietor of the orchestra nor the proprietor of the film is fixing prices on the underlying elements of his product in his transactions with film or concert buyers, any more than the manufacturer of an

automobile is fixing prices in his transactions with car buyers on the raw materials or services he has transformed into a motor vehicle. For neither the concert-hall buyer of a symphony orchestra performance, the theater-owner or television-station buyer of a film, nor the purchaser of an automobile is *in* the market for those underlying elements —they are sold in a different market, the one in which the proprietor or the manufacturer buys.

On the other hand, if all proprietors of orchestras or films agreed to have a single common-sales agent sell their finished products at prices fixed by the agency—whether at $5,000 a performance, or $500,000 a year for all performances each concert hall or theater owner wanted—the violation of Section 1 would be apparent. In all respects pertinent to the antitrust laws, that is substantively identical to what all music publishing corporations in this country now do through ASCAP and BMI.

8. But, say defendants, we too add something to our pools of otherwise competing copyrights—insurance against liability for inadvertent uses of copyrighted music and indemnification against infringement suits (BMI Br. 12; *see* ASCAP Br. 75).

True enough, but quite irrelevant to whether prices are being fixed on those copyrights.

The addition of insurance and indemnification does not transform the nature of the copyrights into something else. It simply includes in the collection of rights being sold several additional rights which, like the copyrights themselves, could be sold separately.

Here again, if otherwise competing sellers could fix prices with impunity simply by adding other products, services or rights to what their common-sales agent markets, that escape hatch from Section 1 would emasculate the statute.

9. The BMI defendants advance the additional and curious contention that publishing corporations are not fixing prices through BMI because they have turned over the decision regarding prices to be charged to the BMI Board on which they are not represented (BMI Br. 11-12).

Under this reasoning, the various domestic manufacturers of tetracycline, while clearly guilty of price-fixing if the pricing authority were given to the Pharmaceutical Manufacturers Association (on whose Board they are represented), would not be guilty of price-fixing if they were to confer that authority on the Board of the American Iron and Steel Institute. One could envision, if this argument were accepted, a series of cross-price-fixing agreements among the trade associations of all major industries.

The fundamental misconception of the BMI argument concerns what price-fixing is. Whether otherwise competing sellers have allowed the final decision regarding the prices to be charged to be made by a committee of the whole, a committee of elected representatives, a committee of independent third parties, or a totally external and arbitrary factor (*e.g.*, the Dow Jones Average: 960 = $960 a use), the arrangement constitutes price-fixing and is unlawful *per se* for exactly the same reason that any competitors' agreement regarding prices is unlawful *per se*: they prevent prices from being determined solely by "the unrestrained interaction of competitive forces" (*Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 4 (1958)).

10. Both groups of defendants rely on *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (9th Cir. 1967), *cert. denied,* 389 U. S. 1045 (1968)—BMI defendants for the "insurance" point which was not a basis for that decision (BMI Br. 12); and the ASCAP defendants for the proposition that the court's power to set "reasonable" licensing fees under the ASCAP consent decree means that the ASCAP defendants are not fixing prices (ASCAP Br. 69).

We discussed the latter contention in our main brief (at 59-60), and since ASCAP does not address the points there made, we will not repeat them. Suffice it to say here that this ground for the *K-91* decision was rejected by the court below in this case (337 F. Supp. at 399-400) and by the Solicitor General in his *amicus* brief filed on the *certiorari* petition in *K-91* (JA 124-25, 127-28, 130-31). The Solicitor General approved only the "result"— and

supported that exclusively on a ground (market-functioning) nowhere mentioned in the opinion and solely "[i]n the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions" (JA 124-25, 130).

ASCAP quite simply misstates the content of the Solicitor General's *amicus* brief when it says that he argued "that ASCAP does not violate the antitrust laws *because* the right to license directly is preserved" (ASCAP Br. 78) (emphasis in the original). The Solicitor General *noted* the non-exclusivity of ASCAP's rights, but not only did he *not* support the "result" of the *K-91* decision "because" of that ground, he indicated that, absent the market-functioning necessity which had been stipulated to in that case, the common-selling agency device operated by ASCAP would be illegal *per se*:

> "Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting." (JA 124-25)
>
> "If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. . . .
>
> "Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck,* 313 U. S. 387 404), and it is only for that purpose that the combination is tolerated. . . ." (JA 130)

Here, of course, the very thrust of the opinion below and of defendants' own assertions is that collective activity is not necessary at all for market-functioning purposes, let alone "absolutely necessary"—the market would function in a perfectly satisfactory fashion if such collective activity were enjoined.

11. The BMI defendants cite *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163 (1931), and *International Manufacturing Co.* v. *Landon, Inc.,* 336 F. 2d 723, 729 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc.* v. *Landon, Inc.,* 379 U. S. 988 (1965), for the proposition that

> "agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds have been upheld as reasonable." (BMI Br. 12)

If either that proposition or the cases cited were of any utility to defendants on this appeal, one would have expected the ASCAP defendants to have advanced the same point. They have not, and the reason is made evident by the very ground on which the Ninth Circuit in *Landon* both relied on the *Standard Oil* decision and distinguished that ruling from a case such as that presented on this appeal:

> "Appellants argue that Landon was guilty of patent misuse because it adopted a policy of mandatory package licensing of both the Cavenah and Pace patents. The trial court found that although the two patents were issued at different times, they together covered only a single article. No commercially feasible device could be manufactured under one of the patents without infringing the other. For this reason, Cavenah and Pace were found to be blocking, or interlocking, patents.
>
> ". . . .
>
> "The pooling of the patents, licensing all patents in the pool collectively, and sharing royalties is not

necessarily an antitrust violation. In a case involving blocking patents such an arrangement is the only reasonable method for making the invention available to the public. Standard Oil Co. v. United States, 283 U. S. 163, 170, 51 S. Ct. 421, 75 L. Ed. 926.

"Appellants argue, however, that mandatory package licensing of all the patents in a pool constitutes patent misuse. Although there is no case precisely in point, appellants call our attention to American Securit v. Shatterproof Glass Co., 3 Cir., 268 F. 2d 769, in which it was held that mandatory package licensing of the patents in that case fell within the tying prohibitions of the anti-trust law.

*"That case is different from the one before us in that it involved competing, rather than blocking, patents. In our opinion this distinction is an important one." Id.* at 729.* (Emphasis added.)

Thus, when A and B own blocking patents, A can neither use his patent without obtaining a license to B's, nor interest others in a license to use his patent without the authority to license others to use B's. B, of course, is in exactly the same boat. Hence, a market-functioning necessity exists for A and B to agree to allow each other to license the patents together; and that agreement is exempted

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*In the light of that discussion, it is unnecessary further to analyze the *Standard Oil* decision, although it should be noted that an additional ground set forth in that opinion—that the patentees did not "control" the market in the finished product utilizing the patents—has been overruled *sub silentio* by many subsequent Supreme Court decisions. For example, in *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309-10 (1956), the Court stated

> "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. *It makes no difference* whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; *whether the participants possess market control;* whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices." (Emphasis added.)

by case law from the operation of Section 1 since it would otherwise be impossible to utilize or market those patents. Accordingly, the Ninth Circuit further held,

> "If we were to condemn mandatory package licensing of blocking patents as a patent misuse, an owner of a blocking patent complex would be compelled to license only a part of the patent complex. This would be true even though he knew full well that the licensee would be able to use the patents only by violating the remaining unlicensed patents." *Id.* at 730.

The concept of "blocking" or "interlocking" patents is, of course, entirely foreign to the copyright field. Thus, the market-functioning exemption afforded "blocking" patents has absolutely nothing to do with a pool of otherwise *competing* copyrights or, consequently, with this appeal.

12. What is significant—indeed what amounts to a dead give-away of the baselessness of defendants' contentions that they are not fixing prices—is their further contention that the per-use system (proposed by CBS below as one possible form of relief) would represent a "classic" case of price-fixing,* despite the real freedom of their members to license directly in such a system and despite the lack of "compulsion."

Of course that is true, and for precisely the same reasons that the present system is price-fixing regardless of whether "compulsion" is imposed. Not only would the per-use fees at which ASCAP and BMI would continue to license represent fixed prices but, as we emphasized to the

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*As BMI put it in its post-trial brief at JA 496, n., and now similarly argues (BMI Br. 10), or, as ASCAP asserted below,

> "we contend, in fact, that a per-use license would itself be a price-fixing scheme and a violation of the antitrust laws." ("ASCAP's Memorandum Re Proposed Order on Rule 42(b) Motion," May 5, 1972, p. 6)

court below, those rates would inevitably boost and stabilize direct-licensing prices.*

For defendants to concede, however, that they would be fixing prices under a per-use system is certainly to concede that they are now fixing prices.**

The difference between the per-use system and the present system (and the reason why, despite its price-fixing features, a per-use remedy would represent sensible transitional relief) is that it will immediately free the network user from the necessity of paying twice for the privilege of direct licensing (a cardinal feature of the blanket system); will thus make direct licensing for some portion of the network's requirements a distinctly feasible operation; and since the predicate for obtaining per-use relief would be a declaration that the present system is unlawful, there would be no rational basis for the members of the combination to believe that the present system would be restored. Given the expectation, then, that direct licensing would be

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*In our Memorandum of August 16, 1971, in opposition to the ASCAP defendants' motion for summary judgment, we stated (p. 9),

> "an expansion of the per-use system would bring this market nearer to the point of competitive equilibrium that would exist if the combination itself did not.
>
> "That is not to say, however, that even the widespread use of per-use licensing will make this market truly competitive. As economic evidence will show, it is not possible for a common licensing agent, of the magnitude of this organization, to continue its 'presence' in the market without . . . stabilizing the price. Nevertheless, short of imposing more drastic forms of relief, such as the divestiture of licensing rights, an order compelling ASCAP to grant per-use terms is the only means by which the competitive objectives of the Sherman Act may even be approximated."

**Equally, ASCAP's admission of the price-stabilization effect of per-use prices is an admission of how the present per-use distribution rates to its own members would stabilize prices in the event direct licensing were to occur in a bypass attempt:

> "The fact is, however, that the per-use rates to be set by the court would inevitably become the focal point around which any direct licensing transactions would take place. . . ." (ASCAP's "Comments on CBS' Latest Statement of the Elements of a Per-Use License," May 24, 1973, p. 2)

See our main brief at 37-40 where similar acknowledgments of this point by defendants and the ASCAP economic expert witness, Mr. Nathan, are compiled.

here to stay, and given the actual occurrence of direct licensing transactions, sufficient incentive should exist for the publishing corporations actually to create direct-licensing facilities, which would itself enable the networks to obtain an increasing portion of their requirements by this means. That development should, in turn, prompt ASCAP's and BMI's withdrawal from the market, in the same fashion that ASCAP ultimately withdrew from the movie rights field after the *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions) decision prohibited ASCAP from licensing theaters* and led to movie producers' licensing directly from publishers.**

In short, while price-fixing would inhere in the per-use system as much as it inheres in the present system, the per-use method would be far less restrictive and would represent a transitional means for the ultimate ouster of the common-licensing-agency device with which defendants have suppressed price competition in this market since its inception.

### C. No Other Argument Made by Defendants Has Any Relation to the Price-Fixing Ground on Which Reversal is Principally Sought, Although All Appear Geared to Deflect Attention from It.

Alternative verbalizations aside, what defendants are really saying, again and again throughout their briefs, boils down to the following theme:

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*ASCAP implies that *Alden-Rochelle* is of no interest on this appeal because Judge Liebel vacated the injunction "in recognition that the 1950 Amended Final Judgment [consent decree] had met the problems he had found" (ASCAP Br. 77). Since *Alden-Rochelle* involved ASCAP's price-fixing in sales to movie exhibitors, and since the 1950 consent decree enjoined ASCAP from licensing exhibitors or suing them for copyright infringement (E 128, para's. IV(e) and (f)), the decree certainly cured the problems Judge Liebel had found —but that hardly means that the holding of price-fixing is inapplicable. Indeed, the manner in which that price-fixing problem was cured (ASCAP's ouster from the market) offers direct precedent for the alternative method by which it may be cured here.

**If ASCAP and BMI did not withdraw at that time, the court, under retained jurisdiction, could fashion whatever further relief was then indicated.

> *All* CBS really *wants,* say defendants, is the direct licensing of music. CBS should therefore have *asked* the publishing corporations to license directly. Not having asked, CBS necessarily tried a speculative issue: whether it would be seriously injured in attempting direct licensing (a bypass) in the absence of judicial relief. On that issue, the trial court believed defendants' witnesses, so that should be the end of the case.

That the trial court accepted these notions as an accurate analysis of the case is reflected in the following conclusory passage of the decision:

> "As we view the matter, CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing." 400 F. Supp. at 764, JA 611.

That conclusion is *incidentally* erroneous in that it rejects, as a matter of law, the significant threats of disadvantage and loss entailed in a bypass—such as the sanctions defendants impose on direct licensing (discussed in Point II.B.4. of our main brief and never answered by defendants' briefs) and the problem of having to deal at inflated prices for music-in-the-can (another subject which defendants' briefs attempt to elide but conspicuously fail to answer*).

But the major errors of the court's conclusion and defendants' supporting contentions are these: The right to engage in direct licensing, in and of itself, is *not* all that

*Defendants' complain that CBS did not provide requested information regarding the life-cycle of its $100 million inventory of programs and films, and suggest that the entire music-in-the-can problem should be deemed "theoretical" in the absence of such information. The argument is a red herring. Since the music-in-the-can problem is every bit as bad with respect to all existing films from which CBS would attempt to refurbish its inventory as past stock were consumed, the rate of that consumption has nothing whatever to do with the point (*see* our main brief at 98-100).

CBS "wants," and is not all the antitrust laws guarantee. Buyers from any price-fixing conspirators have such a right —they deal directly all the time. What CBS seeks is the opportunity to buy at a price that is not boosted and stabilized by the continued presence of a combine in the market; the right to deal in a marketplace that is unrestrained. It is that to which CBS—any buyer—is entitled under the Sherman Act. And there is no way that CBS can obtain that result on its own, no matter what CBS "asks" the publishing corporations to do, and no matter what they are willing to do, short of dismantling the common-sales-agency systems.

Certainly, there is nothing in the history of the antitrust laws that suggests that a buyer must resort to the self-help alternative of "asking" price-fixing conspirators to please remove their consortium apparatus from the marketplace, or, by years of self-help efforts, attempt to break down the price-inflating effect against the continued operation of that apparatus. The entire history of these statutes is to the contrary.

Yet, because the trial court in this action declined to accept that these facts presented a *per se* price-fixing case, CBS was put in the position of having to prove that self-help efforts, which the law did not require, were blocked by barriers that would cause it competitive disadvantage or loss. And that position became even more anomalous when the court finally held that the only pertinent barriers were those that were impossible to surmount without prohibitive consequences; and then further indicated that the only believable proof capable of satisfying such a test was the sort of "hard" evidence of incurred loss compilable solely on an actual attempt.

What apparently persuaded the trial court that *all* CBS wanted was direct licensing, and that self-help efforts should be tried, was that CBS's initial moderate request for relief—the installation of a per-use licensing system—could be made to appear to seek only the direct-licensing right. The objective of that requested relief was not, however, so limited.

As indicated above (p. 20, n.), we stressed at the earliest opportunity that the per-use remedy would not in itself make the market competitive since "it is not possible for a common licensing agent, of the magnitude of this organization [ASCAP or BMI], to continue its 'presence' in the market without . . . stabilizing the price." Thus, while we believed that a per-use order was likely to spur ASCAP's and BMI's removal from the market, we nevertheless made it clear by September 1971 that we would seek the full injunctive remedy in the alternative (JA 259-60).

These, of course, are details of relief; and the trial and this appeal concern exclusively the question of liability. Reference is made here to the per-use remedy because it appears to have been on the basis of that request that the trial court concluded that self-help efforts would achieve the antitrust objectives of this suit, and because that erroneous perception seems to have been responsible for the errors of law from which this appeal is principally taken.

**D. Apart from the Fact That the Bulk of Defendants' Arguments Are Unrelated to the Main Points of This Appeal, They Are Based Primarily on Inaccurate Descriptions of the Record.**

The court below reached four principal factual conclusions in this case:

(a) music-in-the-can leverage will not rise to the level of concerted "hold-ups" (400 F. Supp. at 775-76, JA 622-23);

(b) resistance or disinclination to deal directly will not rise to the level of concerted refusals to deal (400 F. Supp. at 768, JA 615);

(c) the lack of and need for direct-licensing facilities (including the requisite "central clearing machinery through which transactions could be brokered") will not rise to the level of mechanical impracticability (400 F. Supp. at 758, 761, JA 605, 608); and

(d) with "a long period of advance preparation," mechanical problems can be overcome (400 F. Supp. at 759, 764, JA 606, 611).

Since "hold-ups," concerted refusals to deal and mechanical impracticability far exceed any legal tests relevant to the issues of this appeal, we will not review defendants' extensive discussions of why parts of the record (mainly their own testimony) are consistent with such findings. What we will respond to are several significant examples of defendants' misstatements of those findings, the record, and the CBS position in this case.

1. ASCAP claims that the trial court was "persuaded" that premiums payable on music-in-the-can "would be inconsequential" (ASCAP Br. 63). There is no such finding, and defendants cite none.*

2. Defendants claim that the trial court found, not simply that mechanical obstacles to direct licensing could be overcome, but that there were no mechanical difficulties at all (ASCAP Br. 36; *see* BMI Br. 8). If that view were correct, the trial court's other findings, that "some central clearing machinery" had to be established (400 F. Supp. at 762, JA 609) and that "a long period of advance preparation" was required (400 F. Supp. at 759, JA 606) would not have made sense.

3. ASCAP claims that CBS offered no proof regarding the steps that might be taken by CBS during such "a long period of advance preparation" (ASCAP Br. 38). Thus ignored are the points made in our main brief at 91-95 and the unchallenged testimony and unexplained admissions as to why such "preparation" could not possibly remove any form of bypass injury nor, more importantly, create access to a competitive market.

4. Defendants rely heavily (as did the trial court) on the testimony of Michael Dann (a former CBS em-

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*Had any been made, it would indeed have been clearly erroneous. The publishers' and writers' leverage in this situation is manifest; randomized over thousands of licensing transactions, the price-inflating effect is inevitable. The economists for both sides agreed (Nathan Tr. 3903, 4052; Fisher Tr. 1686-87, 4805-08); BMI's trial memorandum affirmatively asserted that the situation in the aggregate would be "intolerable" for a network (JA 354); and, really, the point is so self-evident economically that judicial notice of it may be taken as it was in *Alden-Rochelle, supra,* 80 F. Supp. at 904-05 (*see* our main brief at 95-100).

ployee). Dann's testimony was thoroughly inconsistent with, and thoroughly discredited by, an affidavit he had submitted earlier in the case (E 808). Nowhere is that affidavit referred to in defendants' briefs or the lower court opinion.

5. ASCAP claims that "witness after witness" "rebutted" "disinclination" to deal directly or any such "absurd notion" (ASCAP Br. 55) and that the only witness who confirmed it was Walter Dean, a CBS employee (*id.* at 57).

This is not merely untrue (*see* Addenda A and B, which review the admissions to resistance to direct licensing given by every publisher and writer examined on the subject) but a studious elision.

What ASCAP is really saying is that the word "disinclination," which has become ASCAP's own term of art, means, not what the word normally implies (resistant --in this case to direct licensing), but an outright refusal to deal.*

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*The history of several terms in this case, such as "disinclination" and "hold-ups," illustrate what turned out to be a highly successful, though not ingenuous, defense tactic.

"Disinclination" was first used in a 1972 CBS brief as the most neutral way of describing the hostility to direct licensing already evinced by several publisher deponents (CBS's Memorandum in Opposition to ASCAP's Motion for a Protective Order, September 29, 1972, p. 23). Defendants seized on the word, made it their own term of art to describe the far more extreme proposition of "refusals to deal," and somehow led the trial court into believing that since the word (in its normal meaning) had originally come from a CBS brief, CBS was tendering "refusals to deal" as an issue and necessary element of its claims (*e.g.*, JA 442; Tr. 2361-62, 2389, 2842, 2844). Hence, the final opinion (which is largely a paraphrase of defendants' post-trial briefs) frequently states that CBS's case "rests" on the ability to establish "refusals to deal" or the practical equivalent (*e.g.*, 400 F. Supp. at 752, 765, JA 599, 612).

The same process was repeated for the word "hold-up," the only difference being that the word was first used by a CBS deponent, rather than in a CBS brief.

A corollary tactic has been for defendants, after sloganizing a word such as "disinclination," to charge us with using slogans and labels, because we originally uttered the word they've now transformed (*e.g.* ASCAP Br. 55). This is a game that can obviously be played with any words in the vocabulary. It is only unfortunate that the trial court was misled.

It is only on that coined usage of the term that ASCAP can say "witness after witness" "rebutted" "disinclination," for the several writer and publisher witnesses ASCAP called to testify that they "would deal" dutifully gave such testimony.

In fact, if there were no resistance among defendants to direct licensing, what are we fighting about in this case? Why are defendants so vigorously protesting a per-use licensing system that would immediately permit direct licensing to occur? Why did the ASCAP Board reject that possibility out of hand, without even hearing any proposed terms, or regard per-use licensing as something that might "burn down [its] house" (Adams [ASCAP's President], D. 7-8)? Why, indeed, do defendants resist the prospect of their common-sales agencies removing themselves from the market?

It is that sort of disinclination which ASCAP's sloganization of the word seeks to obscure.

6. Having no conceivable legal basis for making "refusals to deal" a relevant, let alone a determinative issue of this case, ASCAP typically attempts to make it appear that it was CBS which "tendered" such an issue (ASCAP Br. 17, 50), and, just as typically, the charge is based on out-of-context quotations.

The supposed "tendering" is said to have occurred when several CBS witnesses disclosed their concern that such refusals might well occur (ASCAP Br. 50)—hardly a concession by counsel, the tendering of an issue, or even the "shouting" of "boycott" (as it is later described at ASCAP Br. 86-87).

Into the obvious breach, therefore, ASCAP attempts to shove the predicate clause of a sentence in a 1972 CBS discovery brief, which clause, deprived not only of context but of its very subject, seems to say we felt the need to prove "refusals to deal" in order to establish our case (ASCAP Br. 50). We thus restore the excised passage which destroys that impression: *"As one example here, the most direct method* of disproving the principal ASCAP de-

fense (that 'by-passing the society' is a practicable alternative to the blanket license on which ASCAP insists) is to establish" probable refusals to deal, etc. (JA 341) (emphasis added).

In short, such proof would indeed have put an end—most "directly"—to the ASCAP claim that there were barriers to a bypass, and, as we later pointed out in the brief, three of the four publisher witnesses whose depositions had then been taken had confirmed that they would not, in fact, deal directly (Goodman Tr. 1631-32 (quoting Goodman deposition); Vogel D 913-16, 929; Morris D 661-62, 681-82, 700-11—he testified both ways*). But that is a far cry from the sort of concession that ASCAP attempts to attribute to us—that no showing of significant barriers could be made in the absence of such proof.

7. Finally, regarding barriers to a bypass, BMI complains that CBS has designed a "Catch-22" "legal theory for whichever way the facts come out," since for defend-

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*As to Morris's additional testimony regarding the Warner Bros. incident, ASCAP claims that CBS "misrepresents" the record in saying that the incident evoked a "violent" reaction from writers or a "lesson" for today; that the writer "loyalty" to ASCAP evinced in that incident is a "lawyer-created slogan," and that "CBS fails to advise the court" that the real reason "many writers were upset and left Warner" was because of a "boycott" by radio broadcasters (ASCAP Br. 55, 90).

This is one of many instances in which we are charged with having "misrepresented" the record; and since the charge is serious we urge the Court to review the testimony involved (Morris D. 645-55, 680, 731). It will then be apparent that "violent" was Morris's word, not CBS's; "loyalty to ASCAP" was Morris's testimony, not CBS's invention; it was Morris (the only witness in this case who was actually at Warner Bros. at the time) who attributed the writers' reaction as much to Warner's "act of disloyalty" to ASCAP as to Warner's failure to license more than a "small group" of broadcasters; it was Morris who used the word "lesson" (D. 680); and it was Morris who testified, regarding the relevance of that incident to a 1970 bypass attempt (which, by definition, is the very opposite of a broadcaster "boycott"):

> "Q. Based on your experience, particularly the Warner Bros. experience, the Warner Bros. withdrawal of its catalog from ASCAP, do you think there is a good chance that writers might have some adverse reaction to this possibility [direct licensing of CBS]?
>
> "A. I believe so." (D. 731)

ants to prove the lack of competitive disadvantages in a bypass would be to "destroy their 'market functioning defense'" (BMI Br. 26, n.).

There is no catch. Defendants do not have a market-functioning defense in fact. That defendants so admitted in order to support a legally non-existent bypass defense to a price-fixing claim simply reflects the fact that there is no defense to this lawsuit.

## CONCLUSION

For the foregoing reasons and those set forth in our main brief, the order appealed from should be reversed with costs and the district court directed to enter a judgment of liability.

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Respectfully submitted,

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## ADDENDUM F

### The Baselessness of Defendants' Contentions Regarding CBS's Supposedly Belated Assertion of a *Per Se* Price-Fixing Claim and its Alleged "Tendering" of Factual Issues

1. As for defendants' contention that price-fixing and other *per se* offenses were "nowhere mentioned in the complaint" (ASCAP Br. 15-16; BMI Br. 5-6), defendants have never entertained the slightest doubt that the operative facts averred in the complaint charged them with, *inter alia,* fixing prices:

> "But, your Honor, if you just hold that complaint steady for a while and let the breeze clear away the scent and let the sequins subside so they won't shimmer in the sunlight you will find the same old cliches with respect to ASCAP as if we were living in the pre-1940 era. ASCAP is a conspiracy; its catalog is a pool; it is engaged in boycotts; *price fixing,* all words, words that were once used, that once may have had content but which today are empty labels signifying nothing." (JA 201-02) (Emphasis added.)
>
> "The complaint alleges that the rate structure of ASCAP is the product of *price fixing.*" (JA 203) (Emphasis added.)

2. As for ASCAP's assertion that CBS did not view this case as involving a *per se* price-fixing claim "prior to trial" (ASCAP Br. 15-16) (and BMI's similar charge—Br. 6, 8), the centrality of that claim to this case was acknowledged by ASCAP on its 1971 motion for summary judgment:

> "CBS's *major* antitrust attack upon ASCAP is the claim that ASCAP 'fixes prices' . . . ." (JA 189) (Emphasis added.)

—and BMI, about a month after issue was joined in this action, recognized (on its motion for a preliminary injunction) that it had been charged with price-fixing:

"The cases cited by CBS in support of its charge of 'price fixing' are not at all 'squarely in point' as CBS claims . . ." (JA 107)

(a) What ASCAP now principally advances to create the contrary impression is a sentence from CBS counsel's oral argument of September 14, 1971 (on ASCAP's motion for summary judgment), to the effect that "the case turns on" the "elimination of competition" rather than "*per se* pigeonholes" (ASCAP Br. 16, n.). As noted in our reply brief (at 5, n.), the very next sentence of the argument (excised from ASCAP's quotation of the passage) is:

> "But any notion that the defendants in this case are not fixing prices stems from an entirely erroneous concept of what price fixing is. . . ." (JA 270)

The CBS argument then goes on to make the *Socony-Vacuum* price-influence point which defendants also imply was not urged until the trial was over:

> ". . . if competitors agree to buy up distress merchandise so as to support the market price of non-distress merchandise, that is price fixing. That was the *Socony-Vacuum* case.
>
> "Likewise if they agree to charge each customer X per cent of the customer's income, that is price fixing.
>
> "The Court: Is it because you are charged in terms of percentage that you contend there is price fixing?
>
> "Mr. Hruska: No.
>
> "The Court: Or is it because the members of ASCAP have gotten together and have agreed to accept what you called uniform awards?
>
> "Mr. Hruska: No, that makes it more visible but the price fixing doesn't turn on that. The price fixing turns on the fact that a customer is paying

a price which has not been hammered out on the anvil of competition but a price that has been influenced by an agreement, understanding among competitors, that is price fixing." (JA 271-72)

3. What actually underlies defendants' assertion of a "shifting" CBS position is the confusion between an argument of fact and a concession of law—as the following sequence of events indicates:

(a) BMI (on its motion for a preliminary injunction) and ASCAP (on its motion for summary judgment) both asserted that the decision in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (9th Cir. 1967), *cert. denied,* 389 U. S. 1045 (1968), should be determinative of the CBS price-fixing claim because the Ninth Circuit had held in that case that the availability of direct licensing precluded a finding of price-fixing. Neither party apparently recognized the inconsistency between, on the one hand, their assertion that the market would function so well on a direct-licensing basis that the bypass alternative was realistically available to CBS, and, on the other hand, their further contention that their present common-licensing-agency systems were exempted from Section 1 because the market could not function on a direct-licensing basis.

(i) Thus, BMI's counsel had stated on the oral argument of its motion:

> ". . . in K-91 in the Solicitor General's discussion the petitioner maintained that individual arrangements such as we have been discussing are not practical and Solicitor General Griswold says:
>
> > 'Petitioner maintains that *individual arrangements are simply not practical.* We agree that in most if not all instances this is true, but this simply enforces the justification for a blanket license system.'

> "*We think that is really what the situation is, your Honor.* Right now CBS is operating without a license from BMI. As far as we know, they have not approached any publisher or any writer seeking direct licenses from them bypassing the BMI licensing arrangement. The consent decree reads as it reads and they could in some instances certainly do that but they haven't done it. *It really isn't practical. . . .*" (JA 159) (Emphasis added.)*

(ii) To the same effect, ASCAP counsel urged that ASCAP was so "necessary" that if it hadn't existed "I would say that CBS and NBC would have forced it to come into being" (JA 208).

(iii) Similarly, ASCAP's general counsel had testified on deposition, that a television network bypass of ASCAP was "wholly impractical," which was also consistent with the position that ASCAP had maintained before Congress and in earlier consent decree proceedings (*see* Addendum E, pp. 2-5).

(b) Thus, as to defendants' reliance on the "availability" ground of *K-91,* there were essentially two answers:

(i) that defendants had admitted that a bypass alternative was not realistic (and, in the case of BMI, its rights were exclusive); and

(ii) that such an alternative was, in any event, irrelevant in law to the price-fixing claim.

(c) We gave the first answer on the BMI preliminary injunction motion (supplemented by additional facts regarding CBS's music usage, which were also

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*BMI had, of course, by this time admitted in its answer to the complaint that "any attempt by plaintiff to acquire such a large body of rights from the individual affiliates of BMI would be wholly impracticable" (JA 68-69, para. 15).

relevant to CBS's other claims).* We further stated on oral argument that *K-91*

> "... is an illogical decision, and when the time comes in our issues against ASCAP, I think we will demonstrate that. But the main point [on this motion] is that it doesn't apply to BMI." (Transcript of Hearing of July 10, 1970, p. 62)

On the ASCAP motion, we relied on both points (as is indicated by the passage of the oral argument quoted *supra* at 2-3).

(d) In sum, CBS argued that, *even apart from the legal error* of the Ninth Circuit's reliance in *K-91* on the supposed "availability" of direct licensing, defendants had admitted, and the facts otherwise showed, that direct licensing was not available. From that argument by CBS, defendants attempt to extract a concession by CBS that it could not establish its price-fixing claim unless it proved such "unavailability."

4. As for defendants' assertion that CBS took unnecessary discovery and wasted court time by "tendering" fact issues instead of moving for summary judgment (ASCAP Br. 15-16; BMI Br. 6-7):

(a) The basis for possible summary judgment in this case was the price-fixing claim. The counter to such a motion would have been that the market-functioning defense raised material fact questions. Both BMI and ASCAP had previously taken a market-functioning-necessity position (*see supra* at 3-4); and BMI, on its motion for a preliminary injunction, had annexed a copy

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*It might be noted that BMI had contended on the motion that its consent decree "requires BMI to allow . . . direct licenses" (Memorandum In Support of BMI Motion for Preliminary Injunction, June 2, 1970, p. 28). Subsequently BMI's President, Mr. Cramer, conceded on a deposition in a related case that that provision of the decree was inapplicable to television networks (*see* our main brief at 20, n.), which meant that the exclusive rights that BMI obtains on the face of its affiliation agreement were unalleviated vis-a-vis television networks.

of the Solicitor General's *amicus* brief on the *certiorari* petition in *K-91,* which approved the "result" in that case on the market-functioning-necessity ground (JA 115, 124-25, 130).

(b) In granting BMI's motion for a preliminary injunction, the court below rejected our *per se* price-fixing contention by necessary implication. The court held that BMI had "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation" within the meaning of *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F. 2d 738 (2d Cir. 1953), and *Semmes Motors, Inc.* v. *Ford Motor Co.,* 429 F. 2d 1197 (2d Cir. 1970), and that CBS's "contention is necessarily far from demonstrated" and "presently insufficient to warrant the court's refusal to grant relief" (320 F. Supp. at 392-93).

(c) In denying ASCAP's motion for summary judgment in 1972, the district court initially appeared to accept the price-fixing claim in largest part, although it also explicitly defined market-functioning as a factual issue for trial:

> "The policy of the consent decree is clear: the maintenance of an orderly market in the music publishing industry. In this context the words of the Solicitor General bear repeating:
>
> " 'If the market is to *function at all* there *must* be . . . some kind of central licensing system.' (Emphasis supplied [by the court].) [*]
>
> ". . . In other words, if CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.,* permit competition to occur, and still enable the market to function], it

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*The quotation is from the Solicitor General's *amicus* brief in *K-91* which referred to the market for the licensing of music performance rights to more than 5,000 radio stations (JA 126).

would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary'." (337 F. Supp. at 400)

(d) In formulating the pre-trial order of June 12, 1972, the district court, *over our objection,* further conditioned the price-fixing claim on a showing of "compulsion." Defendants suggest that "compulsion" was an issue "tendered" by CBS (ASCAP Br. 15-16; BMI Br. 6-7). BMI acknowledged exactly the opposite in its post-trial brief:

> ". . . CBS quotes a portion of this Court's earlier opinion denying a motion for summary judgment as if to say that there is no issue in this action as to whether CBS has been 'compelled' in restraint of trade and that the only issue is whether the system proposed by CBS can function 'on a more competitive basis'.
>
> "This is an argument which was advanced by CBS in pretrial conference prior to the framing of the Court's order of June 12 [1972]. CBS' argument was rejected then, and is entitled no greater consideration now. . . ." (JA 382)

The fact is that so vigorously did we stress the *per se* nature of this case that ASCAP objected to the very relentnessness of our position:

> "We object to CBS' proposed order because, like CBS' recent memorandum (dated April 11, 1972), its underlying premise is that this case is a *per se* case. . . ." (ASCAP Memorandum Re Proposed Order on Rule 42(b) Motion, May 5, 1972, p. 2)

These are the parties who now say that it was CBS which "tendered" the "compulsion" issue and did not view this case as involving *per se* violations "prior to trial".*

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*It should also be noted that since it had been apparent in this case from the grant of BMI's motion for a preliminary injunction that we would go to trial on some fact issue (whether market-

5. As for defendants' assertion that CBS did not indicate until after the trial that it would seek an injunction against price-fixing (ASCAP Br. 15-16; BMI Br. 8):

(a) On the oral argument of September 14, 1971, CBS indicated that it would, in fact, seek such relief (JA 259-61) and, as CBS counsel then stated,

> "Under Rule 54(c) of the Federal Rules the relief to be awarded in this action is the relief to which we are entitled, not necessarily that for which we have asked [in the complaint]." (JA 260)

(b) ASCAP suggests that there is something shifty in the phrasing of the request as an injunction against price-fixing, rather than as an injunction against ASCAP's continued operation in this market. According to ASCAP, "CBS neglects to advise the Court that this phrasing of its demands for relief was fashioned anew for the appeal" (ASCAP Br. 15-16). The BMI defendants, however, understand full well that there is no substantive difference between the two verbalizations of this request. As BMI notes, "[s]ince CBS claims that BMI and ASCAP fix prices . . . by offering blanket licenses (CBS Brief pp. 84-85), the . . . injunction against price fixing is apparently another way of describing the injunction against the offering of blanket licenses" (BMI Br. 8) (pejoratives omitted).

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functioning or "compulsion" or both) we prepared to do so, and to conduct the necessary discovery, not only in respect of those questions, but also with regard to our monopolization and tying claims, as to which the economic disadvantages of a bypass did present relevant fact issues (*see* Point II.A. and Point IV of our main brief). It is that context which ASCAP fails to note when citing an August 1972 CBS discovery brief and other portions of the September 1971 oral argument for the propositions that the trial would focus on barriers to a bypass as well as other factual issues and that depositions and document production were required (ASCAP Br. 11, 16). Had the court accepted the *per se* price-fixing point on either of the earlier motions made in this case, summary judgment would necessarily have followed—indeed, it should in that event have been granted *sua sponte*—and a trial on other claims would have been obviated.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Appellant, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, Defendants-Appellees. | Docket No. 75-7600 AFFIDAVIT OF SERVICE BY MAIL |

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

The undersigned, being duly sworn, deposes and says: Deponent is over the age of 18 years, is not a party to this action and resides at 64-42 84th Street, Rego Park, N.Y. 11374

On the 3rd day of June 1976 deponent served the annexed Brief, Reply Brief and Addenda A-E to Brief for Plaintiff-Appellant (Two Copies of Each) upon (each of) the below listed attorney(s) by depositing a true copy (copies) of the same securely enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

SEE ATTACHED LIST

Sworn to before me this 3rd )
day of June 1976 )

John Murphy
JOHN MURPHY
Notary Public, State of New York
No. 03-8071585
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978

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